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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Public Interest Obligations)	MM Docket No. 99-360
of TV Broadcast Licensees)	

COMMENTS OF CBS CORPORATION

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Summary

There are few other industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to election coverage, including debates and candidate forums; and provided critical, life-saving information to their communities during times of emergency. It can hardly be questioned, as recognized by the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (the "Advisory Committee"), that "most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly."

Despite this admirable record, some see the transition from analog to digital television as an occasion to impose on broadcasters extensive and burdensome new government regulations. Although these proposals are advanced in the name of the "public interest," in many cases they are little more than recycled versions of the regulatory policies of another era, properly abandoned by the Commission as unnecessary years ago. In other instances, as aptly put by Commissioner Furchtgott-Roth, the proposed new mandates "have no discernible nexus to the transition to digital technology."

Although strongly opposing regulatory initiatives of this kind, CBS in no way contests the applicability of the Commission's present regulations to digital television. Indeed, the Telecommunications Act of 1996 clearly reflects the intent of Congress to retain broadcasters' existing public interest obligations in the digital environment. But there are strong reasons for the Commission to refrain from the kinds of new rules discussed in the Notice, and instead rely

primarily on broadcasters to determine the exact ways in which they will use digital television to serve the public.

First, voluntarism in broadcasting works. A 1998 report of the National Association of Broadcasters documenting the public service activities of broadcasters over the course of a single year shows that, during that period, broadcasters donated billions of dollars worth of air time for public service announcements, raised millions more for charities and charitable causes, devoted large amounts of air time to the coverage of political candidates, and provided extensive on and off-air information and assistance to communities and individuals facing natural and other disasters. CBS and its broadcast stations have been and continue to be active contributors to all of these types of endeavors.

In addition, as part of the broadcast industry's efforts to increase diversity in every aspect of its business, CBS and other major group owners recently created what should become a billion dollar investment fund designed to help women and minorities purchase and operate broadcast stations. The industry has also made great strides in extending the accessibility of its programming to people with disabilities; CBS, for example, provided closed captioning for virtually all of its network programming long before the adoption of any mandates in this area.

In sum, broadcasters have made and continue to make significant contributions to the public interest in a wide variety of ways. The most creative and meaningful of these have had nothing to do with -- and could not have been required by -- any government rule. There is accordingly no reason to believe that burdensome new government regulations are necessary to ensure that broadcasters will find ways to use the digital spectrum to serve their communities.

Moreover, adopting burdensome and detailed new regulations could very well inhibit the growth of digital television. Given the uncertainty which presently exists concerning how digital broadcasting will evolve, the Commission must take care not to adopt regulations which might

act as a disincentive to the introduction of new and innovative services. As Commissioner Powell has emphasized, since “we are at the very preliminary stages of the digital transition [it would be] premature to attempt to fix public interest obligations to a service which has yet to blossom.”

More fundamentally still, although CBS does not here challenge the existing structure of broadcast regulation, it does note that the theories of spectrum scarcity and government “ownership of the airwaves” -- which have long supported content regulations which would clearly be held invalid if applied to the print media -- stand on increasingly precarious ground. As the Commission itself has held, in light of the explosion in the number and type of media outlets, the spectrum scarcity doctrine can no longer justify differential First Amendment treatment of the print and electronic press. Similarly, the notion of “government ownership of the airwaves” as a basis for regulation is fundamentally flawed, since the electromagnetic spectrum is not a thing which can be owned. The spectrum exists only by virtue of electromagnetic radiation, which is produced by a radio transmitter sending energy through space, and can only be utilized through broadcasters’ investment of capital and initiative. And while government may certainly place conditions on licenses it grants, those conditions may not unduly infringe upon constitutional rights. In sum, although the spectrum scarcity doctrine established in *Red Lion Broadcasting Co. v. FCC* may remain good law in the sense that it has not been overruled, its underlying basis has been seriously undermined. Therefore, prudence counsels the Commission not to test the limits of its authority by using the digital transition as an occasion for adopting new and more intrusive forms of content regulation.

CBS believes that many of the specific proposals for new regulation raised in the Notice are, variously, contrary to the deregulatory intent of the Telecommunications Act,

counterproductive to the achievement of the Act's goals, unjustifiable throwbacks to the highly regulatory policies of the past, and violative of the constitutional rights of broadcasters.

Public interest obligations should not attach to all program streams included in a multiplexed digital signal other than the broadcaster's primary "channel." The Telecommunications Act, by its terms, was intended both to reduce regulation and to facilitate broadcasters' ability to offer the public new services. The Commission, in implementing the Act, has sought to avoid the imposition of obligations that might hinder broadcasters' ability to experiment in this area. Imposing public interest obligations on secondary free program services that broadcasters seek to introduce will create significant disincentives to doing so, in contravention of the statute, Congressional intent and sound public policy.

Congress also did not intend that public interest obligations would apply to subscription services. The Act requires payment of fees for such services equal to those that would have been recovered had the spectrum for these services been auctioned. There is no reason to believe that Congress intended both to extract fair market value for these services and also to impose on them affirmative public interest obligations.

Proposals to impose minimum quantitative standards for programming in certain categories, formal ascertainment requirements and "enhanced disclosure" obligations should all be rejected. Sixteen years ago, the Commission eliminated such rules as applied to analog television. In so doing, the Commission concluded that these regulations were overly burdensome and unnecessary to ensure that broadcasters would fulfill their obligations to provide programming responsive to the concerns and needs of their communities. The Commission's reasoning is still valid, and the advent of digital broadcasting provides no basis for returning to these wisely abandoned requirements.

Proposals to increase current obligations to provide closed captions and video description should also be rejected, and further extension of such services should be left to the voluntary efforts of broadcasters. Under the Commission's existing rules, virtually all new programming will be captioned by 2006. The narrow exemptions to these requirements that some wish now to eliminate were created by the Commission for sound reasons and should be preserved.

Development of video description should be left for the present to voluntary efforts. Imposition of requirements to provide this service is inappropriate given the existence of significant practical, technical, legal and constitutional problems associated with it.

Finally, CBS agrees with the Advisory Committee that "it is not reasonable to expect broadcasters alone to provide all the answers [to perceived flaws in the campaign finance system], or to make as the central component of reform Federal mandates upon broadcasters." CBS believes that mandates requiring broadcasters to provide quantified free time to political candidates would violate broadcasters' First Amendment rights, whether subjected to the "strict scrutiny" normally applied to restraints on speech, or analyzed under the more relaxed standards applicable under the spectrum scarcity doctrine. By singling out broadcasters to bear the cost of a reform purportedly for the benefit of society as a whole, such requirements would also represent an unconstitutional taking in violation of the Fifth Amendment.

Although opposing mandates in this area, CBS notes that it and other broadcasters provided significant amounts of free time to presidential candidates to present their views during the 1996 campaign. In the context of the enactment of comprehensive campaign finance reform, CBS would be committed to contribute to a broad-based effort to enhance opportunities for political candidates to present their views via the broadcast media.

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of TV Broadcast Licensees)

CBS Corporation (“CBS”) hereby respectfully submits its comments in response to the Commission’s Notice of Inquiry (“*Notice*” or “*NOI*”) in the above docket, in which the Commission seeks to “collect and consider all views” regarding how broadcasters can meet their public interest obligations in the digital age.¹

There are few other industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to election coverage, including debates, candidate forums and political conventions, over and above the multiple hours of news programming broadcast by many television stations every day; and provided critical, life-saving information to their communities during times of emergency. It can hardly be questioned, as noted by the President's Advisory

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Committee on the Public Interest Obligations of Digital Television Broadcasters (the “Advisory Committee”), that “most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly.”²

It is equally beyond question, we believe, that this commitment stems not from any kind of government compulsion, but from the high value which broadcasters have traditionally placed on good corporate citizenship, and from the common sense recognition that having a strong reputation for community service is simply good business. No government rule can require a television station to sponsor a successful campaign to raise money for cancer research, to collect food for the needy at the holidays, or to find permanent homes for foster children within its community. Yet such activities have long been typical of television stations throughout this country.

The advent of digital television will undoubtedly afford broadcasters with new opportunities to improve life in the communities they serve. In its *Final Report*, the Advisory Committee discusses a number of these, including an enhanced ability to delivery timely and highly focused disaster warnings, and new ways to provide the public with information about political campaigns. Importantly, however, the Advisory Committee has emphasized its “[preference], wherever possible, [for] policy approaches that rely on . . . voluntary self-regulation and economic incentives, as opposed to regulation.”³

² Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Charting the Digital Broadcasting Future: Final Report on the Public Interest Obligations of Digital Television Broadcasters (1998) (“*Advisory Committee Report*” or “*Final Report*”), Section III at 46.

³ *Advisory Committee Report*, Section III at 44.

CBS strongly agrees with this approach. As noted above, the most creative and meaningful aspects of broadcasters' service to their communities has had nothing to do with -- and could not have been required by -- any government rule. There is accordingly no reason to believe that the conversion to digital television will cause broadcasters to abandon their long tradition of public service. By the same token, the digital transition should not serve as the occasion for a return to highly regulatory policies of the past which the Commission has been in the process of discarding, as applied to analog broadcasting, for more than 15 years.

In addition to the lack of necessity for regulation demonstrated by broadcasters' long history of community service, there are other important reasons for the Commission to rely primarily on broadcasters to determine the exact ways in which they will use digital television to serve the public interest. First, given the uncertainty which presently exists concerning how digital broadcasting will evolve, the Commission must take care not to adopt regulations which might act as a disincentive to the introduction of new and innovative services. As Commissioner Powell has emphasized, since "we are at the very preliminary stages of the digital transition [it would be] premature to attempt to fix public interest obligations to a service which has yet to blossom."⁴

⁴ *NOI*, Concurring Statement of Commissioner Michael K. Powell. The Advisory Committee as well has recognized that formulating recommendations for the application of the public interest standard to digital television is difficult:

...because no one really knows how digital television will develop. It is unclear when receiver costs will become low enough to attract significant audiences; when digital broadcasting will actually supplant analog broadcasting; and which transmission format digital broadcasters will choose to offer -- single-signal high-definition programming, multiple-channel multiplexing, or any number of data/information services.

Advisory Committee Report, Section III at 44.

More fundamentally, as we discuss below, the theories of spectrum scarcity and government “ownership of the airwaves” -- which have long been used to sustain regulation of broadcasting which would clearly be held invalid if applied to the print media -- stand on increasingly precarious ground. Just as the Congress directed the Commission in the Telecommunications Act of 1996 (“Telecom Act”) to assess biennially whether its broadcast ownership rules remain “necessary in the public interest as the result of competition,”⁵ we believe that this Commission has an obligation unflinchingly to review the theoretical *and* empirical validity of the spectrum scarcity doctrine before embarking on a course of new and expansive regulation of a form of broadcasting which promises only further to expand the almost bewildering array of sources of information and entertainment which is today available to the American public.

CBS believes that the result of such a review should be a decision by the Commission that the application of new and intrusive forms of content regulation to digital television cannot be justified either as a matter of constitutional law or public policy. At the least, however, we believe such a review should convince the Commission that, as a prudential matter, it adopt broad policies with respect to the public interest use of digital television, leaving broadcasters wide discretion as to the manner of implementing those policies, rather than testing the limits of its regulatory authority by the promulgation of detailed rules.⁶

⁵ Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, 111-112, Sec. 202(h) (Feb. 8, 1996).

⁶ Indeed, long before the spectrum scarcity theory was brought under increasing criticism

In Section II of these comments, we briefly review the many forms of service to the public which have long characterized television broadcasting in this country, and which we believe will continue to do so with the advent of the digital era. In Section III, we discuss the reasons why the continuing validity of the spectrum scarcity and government ownership doctrines as justifications for imposing unique obligations on broadcasters are increasingly subject to doubt, and why, even under these doctrines, the imposition of proposed affirmative obligations are constitutionally suspect. Finally, in Section IV, we comment on several of the specific issues raised by the Commission in its Notice of Inquiry.

II. Broadcasters Have an Outstanding Record of Voluntary Public Service.

Throughout their history, broadcasters have been among the leading corporate citizens in their communities, and have made extraordinary public service contributions in a wide variety of ways. The recent study by the National Association of Broadcasters,⁷ referenced in the *NOI*,

by the exponential growth of media attending the advent of cable television, DBS and -- most of all -- the Internet, the courts recognized that

[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only *general* affirmative duties -- e.g., to strike a balance between various interests in the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. . . . Given . . . [the Commission's] long-established authority to consider program content, this general approach probably minimizes the danger of censorship or pervasive supervision."

Banzhaf v. FCC, 405 F.2d 1082, 1085 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969) (emphasis added).

⁷ National Association of Broadcasters, Broadcasters Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service (April 1998) ("*NAB*

provides a snapshot of the extensive and diverse public service activities in which broadcasters, particularly television stations, regularly engage.

The NAB survey sought to define the extent of station participation in community service activities over a one-year period. The level of public service provided in just that one 12 month period, August 1, 1996 to July 31, 1997, is truly overwhelming in its breadth and depth.

First, the NAB attempted to quantify the amount of free air time that broadcasters donated or otherwise devoted to public service programming. The NAB found that the typical television station responding to the survey⁸ broadcast an average of 137 public service announcements per week. Based on the station-reported average run-of-station rate of \$136 for a thirty-second spot, these PSAs represented a contribution of nearly one million dollars per station per year, or over \$707 million for the television stations that responded to the survey. Projected over all television stations, NAB estimates the total value of PSAs donated yearly at \$1.12 billion. In addition, the survey found that the four major broadcast networks reported airing an average of 41 PSAs per week, a contribution valued at more than \$342 million per year. When combined with the PSA contribution of radio stations, the survey found the value of PSAs donated by broadcasters totaled approximately \$4.6 billion over the course of a single year.⁹

PSAs by no means represent the total contribution by broadcasters of free air time to the community. The NAB found that the respondents to its survey contributed \$40.6 million worth

Report”).

⁸ The NAB reported that 730 television stations responded to the survey, representing 63% of the total number of 1,153 stations. Among radio stations, 3,079 of 7,870, or 39% responded. All four major broadcast networks responded to the survey. *NAB Report* at 5.

⁹ *NAB Report* at 6-7.

of time for political candidates, in the form of candidate forums and debates sponsored either by the stations themselves or outside organizations such as the League of Women Voters. The NAB projects that all stations and networks combined to donate \$148.4 million in free time to political candidates and convention coverage in 1996.¹⁰ Of course, this coverage is in addition to the extensive reporting on political campaigns produced and broadcast by stations and networks during regularly-scheduled news and public affairs programming.

As the survey demonstrates, the donation of air time tells only part of the story of broadcasters' public services contributions. According to the NAB's findings, 92% of respondents reported fundraising or offering other support for charitable causes. The NAB states that, "[c]ollectively, respondents reported raising \$1.13 billion for charities" over one year, "for a projected total of \$2.1 billion raised for charities and charitable causes" for all stations.¹¹ The survey reports that nearly 70 percent of stations run a combination of on and off-air community service campaigns, in which PSAs are broadcast in conjunction with on-the-ground station involvement, such as promotion of and participation in charitable and community events. Beneficiaries of these campaigns include charitable organizations such as the United Way and the American Cancer Society, local aid organizations such as hospitals, libraries, battered women's shelters and food banks, and service organizations such as the Chamber of Commerce and Big Brothers/Big Sisters.¹²

¹⁰ Id. at 10.

¹¹ Id. at 6.

¹² Id. at 9.

The NAB's survey also attempts to capture the unquantifiable ways in which broadcasters step into the breach to provide information, assistance and resources when individuals and communities face adversity. It cites numerous examples of stations' raising money and gathering food and other supplies for the victims of personal tragedies and community disasters. The survey also provides examples of stations' preemption of normal commercial programming for extended periods of time to offer around the clock coverage during disasters, in order to apprise the community of dangers and inform individuals where they can obtain help.¹³

The survey also describes other station activities that improve the lives of those in the community. These include, to name just a few: holiday initiatives, such as the collection of toys for children and sponsorship of holiday dinners for the poor; education initiatives, such as the creation and funding of scholarships for high school students and the raising of funds for school supplies; health initiatives, such as the sponsorship of immunization campaigns, blood drives, and medical screenings; and law enforcement initiatives, such as campaigns to raise funds for bulletproof vests for police officers and for gun buyback programs.¹⁴

It is evident from the NAB's survey that the contributions of local broadcasters to their communities are both extensive and diverse. The donation of massive amounts of free air time for PSAs and political candidates is only one facet of the wide-ranging efforts of broadcasters to improve people's lives in their communities. The NAB findings strongly support the conclusion

¹³ Id. at 13-17.

¹⁴ Id. at 18-24.

that broadcasters, on a voluntary basis, are fulfilling their commitment to serve the public interest.

From its own experience, CBS recognizes the depth and breadth of public service commitment reflected in the NAB survey. CBS is particularly proud of the record of community involvement compiled by its sixteen television stations. The following are a few examples illustrative of the deep commitment of the CBS stations to a wide variety of projects that have made a difference in the stations' communities:

- WFOR-TV, Miami: The Station created Neighbors 4 Neighbors in the aftermath of Hurricane Andrew as a relief effort that consisted of a 15-line phone bank, staffed 18 hours a day by volunteers and station personnel. News reporters and anchors broadcasting live from the phone bank told viewers to call if they were in need of help or if they wanted to help. Special reports profiling affected families and volunteer efforts also served to motivate viewers into action. The response was overwhelming and the phone bank quickly became a community asset for assisting those in crisis.

As South Florida recovered, Station management opted to continue Neighbors as a resource for all those in need, and to respond to crises that face the community, by forming a partnership with community leaders to create a non-profit organization. Neighbors 4 Neighbors has since operated as a 501(c)(3) non-profit organization, funded through foundation grants and corporate donations and housed at the station. With the power of television as one of its greatest assets, the organization quickly expanded its services beyond hurricane relief and evolved into one of the most effective vehicles for connecting those in need with people willing to help. During the past eight years, the campaign has logged nearly 2.5 million calls in the phone bank; helped raise more than \$5 million in donations of cash, foods and services for those in need; and provided direct support to more than 200 local social service agencies. In one innovative program, for example, following a series of shootings in 1998 which took the lives of young children, the station, in partnership with area hospitals and a community college, offered free gun locks to the public. Over 8,000 gun locks were purchased and given away.

- KYW-TV, Philadelphia: The Station is a founding sponsor of the annual Susan G. Komen Race for the Cure, organized locally by the Breast Health Institute since 1991. Since its inception, the Race for the Cure has raised over \$5 million for local breast cancer education, research and early detection. Each year, the Station produces a 30 second PSA, aired approximately 75 times in the weeks before the race, encouraging viewers to participate in, volunteer for or support the race. The Station also produces about five other PSAs for the Breast Health Institute and Buddy Check (a program encouraging women to have a friend

who will remind them to have periodic breast examinations). These PSAs air approximately 500 times a year. In 1997, the Station received a national Emmy Award nomination for its “Live and Learn” public service announcement vignettes, broadcast in connection with this project.

- KPIX-TV, San Francisco: Twice a week in its newscasts, the Station broadcasts a two minute news segment anchored by meteorologist Brian Sussman, in which a child needing adoption is featured. The program is tied to a hotline that allows viewers to call in if they are interested in adopting a child. Information is also available on the Station’s website. The program has aired for ten years, and during that time 86 percent of more than 320 children profiled have been placed in homes. The cities of San Francisco and Oakland proclaimed October 25, 1999, Brian Sussman Day, in acknowledgement and gratitude for his efforts in the areas of adoption and foster care.
- WBBM-TV, Chicago: The Station is well known in its community for its Good Samaritan Grant Awards Program, which has provided recognition and financial support to exemplary community groups that assist individuals and organizations in a variety of ways. The program began when a group of ministers spoke to the station about the problem faced by inner-city mothers who could not find adequate daycare for their children while they attended their jobs. The station began funding church-based day care centers to address the problem. Over eight years, the Station has awarded over \$400,000 from the CBS Foundation to some 90 community groups to fund, for examples, scholarships for after-school programs and the L’Opera Piccolo, which brings opera performances – including sets – into the public schools. The station ensured the program’s responsiveness to community needs by involving community leaders and activists in the review of applications for funds.
- KUTV, Salt Lake City: Since 1988, the Station has operated the Baby Your Baby campaign in partnership with the Utah Department of Health and local sponsors. The campaign of health information for mothers-to-be includes weekly public service announcements hosted by Station anchor Michelle King and frequent news reports. An 800 hotline and website offer additional referral and resource information. Since 1988, in connection with this program, the Station has received a Rocky Mountain Emmy award, the Promax Gold Medallion, a Utah Association Gold Award, and a National Healthy Mothers/Healthy Babies award for Best Sustained Promotion Piece in the Nation.
- KCNC, Denver: For 20 years, the Station has teamed with the Salvation Army to collect and distribute canned and non-perishable food items. In 1999, the Station worked with 97 schools and 200 grocery stores and surpassed its annual goal of collecting half a million cans of food. These items were distributed to more than 17,000 people. The food drive also helps stock food bank shelves to help feed individuals and families throughout the year.
- KDKA-TV, Pittsburgh: For 46 years, the Station has produced and broadcast a fund-raising telethon to benefit Pittsburgh’s Children’s Hospital. The Station also airs an extensive

schedule of public service announcements in support of the Hospital. In 1999, the Station's three-hour live program raised \$1.6 million for the Hospital.

These examples represent only a fraction of the public service efforts engaged in by the above-listed stations, and barely begin to describe the overall efforts of CBS and its stations.

In yet another area of public concern, the broadcast industry has recognized that enhancing diversity within its ranks is a critical component of its public service commitment. The industry has been very active in its efforts to expand minority and female participation in broadcasting at all levels, including ownership. Last year, a group of broadcasting companies, led by CBS and Clear Channel, committed \$175 million to an investment fund -- called the Prism Fund -- designed to help women and minorities to purchase and operate radio and television stations. The broadcasters' commitment is expected to allow the Fund's administrator to make available about \$1 billion of purchasing power to underrepresented groups.

Earlier this year, the National Association of Broadcasters Educational Foundation (NABEF) announced the creation of two programs to provide new opportunities for women and minorities in the broadcast industry. The NAB will provide \$800,000 of the programs' budget of \$1.25 million, with a group of broadcasters, including CBS, supplying the rest.

One program, the Gateway Fund, will offer incentives for entry-level employees, by paying fifty percent of the expenses for training programs in sales, journalism and engineering. The remaining fifty- percent will be paid by the employer-broadcaster. The second program, the Broadcast Leadership Training Program, will provide training to minorities and women through monthly weekend seminars, to be taught by investment experts and experienced broadcast managers. Both programs are intended to complement the Prism Fund, by giving members of

underrepresented groups training that can enhance their ability to acquire and successfully operate broadcast stations.

In summary, the broadcast industry has reason to be proud of its record of voluntary public service. Whether it be by donating billions of dollars of time for PSAs, dedicating enormous amounts of air time to political campaigns, in the form of candidate debates and forums, as well as regularly scheduled news and public affairs programming, sponsoring fundraising for charitable causes, broadcasting emergency information, promoting and participating in a plethora of worthy activities in the community, or fostering diversity within its own industry, broadcasters have proven that voluntarism works. With this history of public service, one may wonder why government involvement to ensure that broadcasters will use digital spectrum in the public interest is thought necessary. In any event, as we now discuss, time and technology have substantially eroded both the constitutional and public policy basis for such regulation.

III. The Erosion of the Constitutional and Policy Rationales for the Unique Regulation of Broadcasting Strongly Counsels that New Content Regulations Applicable to Digital Television be Approached with the Greatest Circumspection.

*The primary rationale for broadcasters' public interest obligations has been the theory that broadcast spectrum is a peculiarly scarce resource. Absent spectrum scarcity, however, the justification for affording broadcasters less First Amendment protection than persons engaged in other modes of communication becomes difficult to discern. ... [T]he Commission must review the empirical basis of "spectrum scarcity" Should we conclude . . . that spectrum scarcity is no longer viable as a factual matter, then the instant effort to engage in additional regulation will be highly problematic in constitutional terms.*¹⁵

We begin this discussion with what we assume is common ground: Not even the most zealous advocate of broadcast regulation would contend that any of the possible content regulations of digital television discussed in the *Notice* would be constitutional if applied to the print media. As stated by a unanimous Supreme Court in *Miami Herald Publishing Company v. Tornillo* in striking down a newspaper right-of-reply statute virtually identical to the personal attack rule:

The choice of material to go into a newspaper, and the decisions made as to ... [its] treatment of public officials and public issues -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹⁶

The Court concluded that "compulsion to publish that which reason tells [editors] should not be published is unconstitutional."¹⁷

¹⁵ *Notice of Inquiry, supra*, Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part at 4 (footnotes omitted).

¹⁶ 418 U.S. 241, 258 (1974).

¹⁷ *Id.* at 256.

Broadcasting has, of course, long been thought to be subject to a different standard of regulation, based on the theories of “spectrum scarcity” and government “ownership of the airwaves.” The argument is that since there are more would-be broadcasters than there is electromagnetic spectrum, the government must control the process of who gets to broadcast on what frequency. Given the necessity of making this determination, the argument goes, government may attach conditions to the use of the spectrum it licenses -- including conditions as to the content of what is broadcast. As classically stated by the Supreme Court in *Red Lion Broadcasting Company v. FCC*,

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.¹⁸

An alternative formulation of this reasoning argues that broadcasters, in being granted a license to transmit over a particular frequency, are given a right to use public property which can be conditioned in the same way as a landlord can specify the terms under which he will rent out his property.

As shown by the withering criticism to which the scarcity doctrine has been subjected by numerous jurists, scholars and former members of the Commission, the matter is not as simple as suggested by these pithy statements.¹⁹ Indeed, in its meticulously documented opinion

¹⁸ 395 U.S. 367, 388 (1969).

¹⁹ See, e.g., *Tribune Company v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (“[i]t may well be that . . . the FCC would be thought arbitrary and capricious if it refused to reconsider its [broadcast-newspaper cross-ownership] rule in light of persuasive evidence that the scarcity rationale is no longer tenable”); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) (“Partly the criticism of *Red Lion* rests on the growing number of broadcast channels.”); *Action for Children's*

eliminating the fairness doctrine -- an opinion which was affirmed by the Court of Appeals and which still stands as the judgment of the FCC -- this Commission *itself* held that the doctrine was unconstitutional and contrary to the public interest, in part because of its finding that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of first amendment review for the electronic press."²⁰ Further, the

Television v. FCC, 58 F.3d 654, 675 (1995), *cert. denied sub nom. Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996) (Edwards, C.J., dissenting) (spectrum scarcity is an "indefensible notion" and "today . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("Technical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting conventional, single-channel broadcasting -- and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the theory that media were using a 'scarce resource,' the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles* at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J.Gregory Sidak, *Foreign Investment in American Telecommunications: Free Speech* at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, CATO Policy Analysis, No. 282 at 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

²⁰ *In Re Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York*, 2 FCC Rcd. 5043, 5054-55 (1987), *recon. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub*

Commission roundly rejected the notion that government intrusion into broadcast content is no more troubling than a landlord's specifying the terms of a lease. It is "well established," the Commission noted, that "government may not condition the receipt of a public benefit on the relinquishment of a constitutional right."²¹

It is not the burden of the discussion which follows that broadcasters' existing public interest obligations should not be applied to digital television. Congress has clearly mandated that digital broadcasters are not to be relieved of those obligations.²² Much less do we intend here to challenge the entire structure of broadcast regulation as being unconstitutional. What we do intend is to suggest that although *Red Lion* may remain good law in the sense that it has not been overruled and continues to be cited by the Supreme Court²³ (albeit without examination of

nom. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) ("*Syracuse Peace Council*").

²¹ *Id.* at 505.

²² 47 U.S.C. § 336(d).

²³ *Turner Broadcasting System v. FCC*, 512 U.S. 622, 637-39 (1994); *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 567 (1990); *League of Women Voters v. FCC*, 468 U.S. 364 (1984); *CBS v. FCC*, 453 U.S. 367, 395-96 (1981). Notwithstanding its continued reliance on *Red Lion*, the Supreme Court has clearly indicated its possible willingness to reexamine that decision. Thus, in *League of Women Voters v. FCC*, *supra*, the Court stated:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required

468 U.S. at 376, n.11 (emphasis added) (citation omitted).

its underlying premises), the rationale of that decision has been seriously undermined. Therefore, we believe that, if nothing else, prudence counsels the Commission not to test the limits of its authority by using the digital transition as an occasion for adopting new and more intrusive forms of content regulation.

Of particular relevance in this regard is the case of *Time Warner Entertainment Co. L.P. v. FCC*.²⁴ In *Time Warner*, a panel of the United States Court of Appeals for the District of Columbia Circuit, relying on *Red Lion* and the spectrum scarcity theory, sustained against First Amendment challenge a provision of the 1992 Cable Television Consumer Protection and Competition Act which required licensees of direct broadcast satellite services (“DBS”) to reserve between four and seven percent of their channel capacity “exclusively for non-commercial programming of an educational and informational nature.”²⁵ That position, however, could not command a majority of the full Court. A petition for rehearing *en banc* was denied by a 5-5 vote, with the five dissenters arguing that *Red Lion* should not be extended to justify content regulations imposed on DBS providers, because “[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting.”²⁶ The dissenters went further, however, and expressed significant doubt as to the continued vitality of *Red Lion* “[e]ven in its heartland application” to broadcasting. The

²⁴ 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723 (1197).

²⁵ 93 F.3d at 973. The dissenters would have considered on rehearing whether the DBS regulation could have been justified as a condition legitimately attached to a government grant. 105 F.3d at 726-28. The viability of this theory as the basis for content regulation of digital television is discussed at pages 31-34, *infra*.

²⁶ 105 F.3d at 724.